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In The

Supreme Court of the United States

October Term, 1994

JIM EDMOND,

Petitioner,

v.

NEWMAN WHITNEY, A DIVISION OF NEWMAN MACHINE COMPANY, INC. AND MEMPHIS MACHINERY AND SUPPLY CO., INC.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT NEWMAN WHITNEY, A DIVISION OF NEWMAN MACHINE COMPANY, INC.'S BRIEF IN OPPOSITION

RALPH E. ROOD
Counsel of Record
GHOLSON, HICKS, NICHOLS & WARD
Attorneys for Respondent
Post Office Box 1111
Columbus, MS 39703-1111
(601) 327-0662

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTION PRESENTED

1. Whether the finding by the Court of Appeals that the Plaintiff/Petitioner failed to meet his burden of proof is the type of case which warrants review by this Court?

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RULES CITED:

Federal Rule of Civil Procedure 60(b) 1, 2

Rule 10.1.(a), Supreme Court Rules 5

TO THE HONORABLE SUPREME COURT:

The respondent, Newman Whitney, a division of Newman Machine Company, Inc., through its counsel of record, respectfully requests that this Court deny the Petition for a Writ of Certiorari filed by the Petitioner, Jim Edmond.

OPINIONS BELOW

In addition to the opinion of the United States Court of Appeals for the Fifth Circuit Affirming the Judgments As a Matter of Law in favor of the Defendants entered by the United States District Court for the Northern District of Mississippi which are reproduced in the Appendix to the Petition for Certiorari, the United States District Court for the Northern District of Mississippi entered a Memorandum Opinion holding in abeyance Edmond's Rule 60(b) Motion for Relief from Judgment pending resolution of the appeal to the Fifth Circuit Court of Appeals and issuance of a mandate. The Memorandum Opinion is reproduced as an Appendix to this Brief.

STATEMENT OF THE CASE

In 1989, Jim Edmond ("Edmond") filed a products liability action against Newman Whitney, a division of Newman Machine Company, Inc. ("Newman") in the United States District Court for the Northern District of Mississippi. On December 8, 1992, after considering all of the evidence and all inferences in a light most favorable

to Edmond (Petitioner's App. A-13), the District Court granted Newman's Motion for Judgment as a Matter of Law (Petitioner's App. A-15).

While Edmond's appeal to the Fifth Circuit Court of Appeals was pending, Edmond filed a Motion for Relief from Judgment pursuant to Federal Rule of Civil Procedure 60(b). In the Memorandum Opinion holding the Rule 60(b) motion in abeyance pending resolution of the appeal by the Fifth Circuit and issuance of a mandate, the District Court, while noting that the basis for Edmond's Rule 60(b) motion was the pronouncement on Mississippi products liability law as expressed by the Mississippi Supreme Court in *Sperry-New Holland v. Prestage*, 617 So.2d 248 (Miss. 1993), stated the application of products liability law was not the sole basis for rendering judgment as a matter of law and reiterated the Court's prior ruling that the plaintiff failed to carry his case on the element of causation. (Respondent's App. A-5).

The Court of Appeals, after considering the briefs, reviewing the record and hearing oral argument, found the District Court's Grants of Judgment as a Matter of Law were free of reversible error. The Court of Appeals went on to hold that, regardless of the reasons assigned by the District Court, Edmond's inability to adduce any competent evidence that his injury was proximately caused by a defect in the design or manufacture of the machine in which his injury was sustained doomed his ability to recover and that failing to supply the necessary nexus between a defect in the machine and the proximate cause of the injury, Edmond simply failed to meet his burden of proof. (Petitioner's App. A-3-4).

SUMMARY OF THE ARGUMENT

The grant of a Writ of Certiorari is inappropriate when the only question to be presented for review is whether the plaintiff adduced enough evidence to establish proximate cause.

ARGUMENT

I.

THE GRANT OF A WRIT OF CERTIORARI IS INAPPROPRIATE WHEN THE ONLY QUESTION TO BE PRESENTED FOR REVIEW IS WHETHER THE PLAINTIFF ADDUCED ENOUGH EVIDENCE TO ESTABLISH PROXIMATE CAUSE.

Following a full trial on the merits, the District Court found as a matter of law that Edmond, who rested his case in chief without testifying as to how the injury occurred to his hand, failed to carry his case on the element of causation. (Respondent's App. A-5). On appeal, the Fifth Circuit reviewed the record and concluded:

> " . . . Edmond's inability to adduce any competent evidence that his injury was proximately caused by a defect in the design or manufacture of the machine in which his injury was sustained doomed his ability to recover. Edmond did not, presumably because he could not, testify as to the proximate cause of his accident; and the evidence he adduced – including, without limitation, his expert's testimony – did nothing to supply the necessary nexus between a

> defect in the machine and the proximate cause of the injury.
>
> Absent that, Edmond simply failed to meet his burden of proof . . . " (Petitioner's App. A-4).

The United States Supreme Court is not the place to review a conflict of the evidence nor to reverse a Court of Appeals because were the Supreme Court in its place, it would find the record tilting one way rather than the other. *NLRB v. Pittsburgh Steam Ship Co.*, 340 U.S. 498, 503, 71 S.Ct. 453, 945 L.Ed. 479 (1951).

Contrary to the petitioner's assertion that the Court of Appeals' decision is in direct conflict with the Mississippi Supreme Court, it is clear from the opinion (Petitioner's App. A-3-4) that the appellate court found it unnecessary to consider Mississippi products liability law because the plaintiff failed to establish proximate cause and thus failed to meet his burden of proof. The granting of a Writ of Certiorari is not warranted merely to review the evidence or inferences drawn from it. *General Talking Pictures Corporation v. Western Electric Company, Inc.*, 304 U.S. 175, 178-179, 58 S.Ct. 849, 851, 82 L.Ed.2d 1273 (1938).

Finally, this does not represent a case in which a decision of a United States Court of Appeals is in conflict with a decision of another United States Court of Appeals on the same matter nor has the Court of Appeals decided a federal question in a way in conflict with a state court of last resort; and, lastly, there is absolutely nothing to suggest that the Court of Appeals so far departed from the accepted and usual course of judicial proceedings, or sanctions such a departure by a lower court, as to call for

an exercise of this Court's power of supervision. Rule 10.1.(a), Supreme Court Rules.

CONCLUSION

Edmond's Petition is nothing more than a request that this Court review the record and determine that his evidence was sufficient to establish proximate cause, and, as such, should be denied.

DATED: March 2, 1995

Respectfully submitted,

RALPH E. ROOD
Counsel of Record
GHOLSON, HICKS, NICHOLS & WARD
Attorneys for Respondent
Post Office Box 1111
Columbus, MS 39703-1111
(601) 327-0662

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

JIM EDMOND AND LIBERTY MUTUAL INSURANCE COMPANY — Plaintiff

LIBERTY MUTUAL INSURANCE COMPANY — Intervenor

v. — No. EC89-321-D-D

NEWMAN-WHITNEY, A DIVISION OF NEWMAN MACHINE COMPANY, INC., ET AL — Defendant

MEMORANDUM OPINION

(Filed Feb. 22, 1994)

Final judgment and Order granting judgment as a matter of law was entered on December 8, 1992 in the above styled cause. A motion for new trial was denied on February 3, 1993. A notice of appeal to the Fifth Circuit Court of Appeal was filed on March 4, 1993. The court has been advised by the parties that the appeal before the Fifth Circuit is moving forward in due course with appellant's brief having been filed and brief from the appellee due soon. Upon review of the pending motions on the court's docket, the undersigned notes that despite the appeal plaintiff returned to this court on June 8, 1993, and filed a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b). The basis for the Rule 60(b) motion is found in the change in Mississippi products liability law as expressed by the Mississippi Supreme Court in *Sperry-New Holland v. Prestage,* 617 So. 2d 248 (Miss. 1993). The undersigned has addressed, at length,

the Pestage decision and its impact on Mississippi products liability cases. For a full discussion, see *Batts v. Tow-Motor Forklift, Co., et al,* No. DC88-71-D-D, February 8, 1994, (Davidson, J.), designated by the undersigned for publication by West Publishing Company in Federal Supplement.

Of course, the traditional rule of procedure is that the district court is divested of jurisdiction upon the filing of the notice of appeal. Citing *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928 (5th Cir. 1976), movant argues that the district court can indicate to the appellate court if it is inclined to grant the Rule 60(b) motion, thus allowing the movant/appellant to seek a remand from the appellate court to the district court where the motion is pending.[1] *Moore's Federal Practice* contains an excellent summary of the proper procedure that the district court should follow in such instances.

> The traditional rule is that when an appeal is taken from the district court, the latter court is divested of jurisdiction except to take action in aid of the appeal until the case is remanded to it by the appellate court. As a result, the district court is without power to *grant* relief under Rule 60(b), whether the motion is made prior to or after the appeal is taken, except with permission of the appellate court.
>
> Some circuits that have adhered to the traditional rule have required appellate court permission for the district court to *entertain* a Rule 60(b) motion. These are the Third, Tenth, and

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[1] *See Ingraham v. United States*, 808 F.2d 1075, 1081 (5th Cir. 1987) (indicating approval of the approach outlined in *Lairsey*).

Second, Circuits, although cases in the latter two circuits have not been completely uniform. It has been held that the appellate court will grant such permission, i.e., a remand, only if there is a reasonable showing that if leave is given, the trial court might properly grant the Rule 60(b) motion. Also it has been held that the traditional rule will not bar a district court from hearing the motion when the appeal is not yet docketed in the appellate court. Many circuits, cognizant of the time and expense involved in seeking relief in the appellate court have, on the basis of the district court's jurisdiction to act in aid of an appeal departed somewhat from the traditional rule and held that the district court, without appellate court permission, has the power to both *consider,* and *deny* Rule 60(b) motions. However, these circuits also take the position that if the district court indicates it is inclined to *grant* the motion, remand must be sought and obtained before the district court can take such action. Cases in the First, Fifth, Sixth, Seventh, Eighth, Tenth, and District of Columbia Circuits support this position. This procedure is also endorsed in some Second Circuit cases, although that circuit adheres to the traditional jurisdictional rule.

The Ninth Circuit, which adheres to the view that the filing of a notice of appeal divests the district court of jurisdiction to dispose of the motion without a remand from the court of appeals, has in the past followed different procedures. Some of its cases have required movants to file the 60(b) motion in the district court asking if that court would *grant* the motion, while others have directed that parties apply for an order indicating that the district

> court would *entertain* such a motion. However, the procedure appears to have unified with the requirement that movants ask the district to indicate if it wishes to entertain the motion or to grant it, and then, if appropriate, move the appellate court for a remand.

7 *Moore's Federal Practice,* para. 60.30[2] (2d ed. 1993).

Consistent with the procedure discussed in *Moore's,* this court's research reveals that the district court may consider a Rule 60(b) motion while an appeal is pending, *if certain steps are taken to preserve judicial resources of both the trial and the appellate court.* If the district court is inclined to grant the requested relief sought in the Rule 60(b) motion, a remand or "other permission" must be obtained from the appellate court. *Brown v. United Insurance Company of America,* 807 F.2d 1239, 1241-42 n.1 (5th Cir. 1987); *Alvestad v. Monsanto Co.,* 671 F.2d 908, 911 n.2 (5th Cir. 1982); *United States v. Hitchmon,* 602 F.2d 689, 692 (5th Cir. 1979); *Lairsey v. Advance Abrasives Co.,* 542 F.2d 928, 932 (5th Cir. 1976); *Dow Chemical, USA v. Consumer Product Safety Commission,* 464 F. Supp. 904, 906 (W.D. La. 1979). To this end, it is incumbent upon the movant/appellant to notify the appellate court that a rule 60(b) motion is pending in the trial court and request that no action be taken on the appeal pending disposition of the motion by the court below. *Dow Chemical,* 464 F. Supp. at 906 n.2. In such cases, the appellate court can "routinely stay" the appeal. *Id.*

However, in the case *sub judice,* the appellant has informed the district court that he has taken no steps to apprise the appellate court that he has a Rule 60(b) motion pending in this court. Furthermore, the district

court expresses no inclination at this time to grant the Rule 60(b) motion on the merits. While the undersigned has addressed the change in Mississippi's products liability law in its opinion in *Batts, supra,* that issue was *not* the sole basis for rendering judgment as a matter of law. The trial of this products liability case in this court was somewhat unique. Plaintiff rested his case-in-chief without testifying as to how the injury occurred to his hand. Instead, plaintiff relied upon a *res ipsa loquitur* theory of causation. Pursuant to *Edwards v. Sears, Roebuck and Company,* 512 F.2d 276, 287 (5th Cir. 1975), the court ruled, in addition to the "open and obvious" bar, that plaintiff had failed to carry his case on the element of causation. The plaintiff argues that for a strict liability case, causation need not be proved.

In a strict liability case, plaintiff is relieved of the burden of proving fault, which is supplied as a matter of law. *Toliver v. General Motors,* 482 So. 2d 213, 215 (Miss. 1986); *State Stove Manufacturing Co. v. Hodges,* 189 So. 2d 113, 119 (Miss. 1966). In this sense, "fault" consists of the "duty, breach" elements of a traditional negligence action. Whether or not plaintiff can rely upon a *res ipsa loquitur* concept to show how the injury occurred remains a viable, active issue for appellate review.

Therefore, for the reasons stated herein, the district court is of the opinion that the appeal to the Fifth Circuit Court of Appeals should proceed. Despite the recent developments in Mississippi products liability law which affect this case, another justiciable, outcome-determinative issue remains in the case. This issue is ripe for appellate review. Obviously, plaintiff's Rule 60(b) motion will be

held in abeyance pending resolution of the appeal and issuance of a mandate.

SO ORDERED.

THIS 22nd day of February, 1994.

/s/ Glen H. Davidson
United States
District Judge